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No. 98-524

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1998

M. MAUREEN POLSBY, M.D.,

*Petitioner,*

v.

STEVEN G. SPRUILL, ULDIS KLAVINS, and THE HEARST CORPORATION

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF IN OPPOSITION

BRUCE W. SANFORD
*Counsel of Record*
ROBERT D. LYSTAD
DAVID S. WACHEN
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1500
*Counsel for Respondents*

## QUESTIONS PRESENTED

Whether the Court should review the straightforward dismissal of Petitioner's common-law right of publicity claim premised on settled District of Columbia law, where the courts below, after considering the undisputed facts, found no legal basis for her claim.

Whether the unanimous summary affirmance by a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit, in accordance with procedures established by that court and approved of by this Court, and upon consideration of the submissions of the parties, constituted sufficient appellate review.

## PARTIES TO THE PROCEEDINGS

Petitioner M. Maureen Polsby, M.D. was the plaintiff in the United States District Court for the District of Columbia. Dr. Polsby was the appellant in the appeal to the United States District Court for the District of Columbia Circuit.

Respondent Steven G. Spruill, defendant and appellee below, is an author of fourteen works of fiction who wrote the novel at issue in this case. Mr. Spruill is a citizen of Virginia. Mr. Spruill is not employed by The Hearst Corporation.

Respondent Uldis Klavins, defendant and appellee below, is an artist who created illustrations accompanying the condensed version of Mr. Spruill's novel published in Good Housekeeping magazine and at issue in this case. Mr. Klavins is a citizen of Connecticut. Mr. Klavins is not employed by The Hearst Corporation.

Respondent The Hearst Corporation, defendant and appellee below, is a Delaware corporation with its principal place of business in New York. At all times relevant to these proceedings, The Hearst Corporation owned and published Good Housekeeping.

## RULE 29.6 LISTING

Respondent The Hearst Corporation has no parent companies. It owns a majority interest in Hearst-Argyle Television, Inc., a publicly held company, but otherwise has no publicly held, non-wholly owned subsidiaries.

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*Respondents.*

## BRIEF IN OPPOSITION

Respondents Steven G. Spruill, Uldis Klavins and The Hearst Corporation respectfully request that the Court deny this Petition, which seeks nothing more than a reexamination of the straightforward dismissal of Petitioner M. Maureen Polsby, M.D.'s common-law right of publicity claim. On appeal, a unanimous three-judge panel of the United States Court of Appeals for the District of Columbia Circuit summarily affirmed the dismissal in accordance with established procedures of that court, approved by this Court. This unremarkable result does not raise any legitimate constitutional issue or conflict among the circuits, and is in keeping with the decisions of this Court and the Court of Appeals of the District of Columbia. In accordance with Rule 10, the Court should therefore deny the Petition.

## STATEMENT OF THE CASE

Dr. Polsby's lawsuit arises from the publication of Mr. Spruill's novel, *My Soul to Take*, and an adaptation of the

novel in Good Housekeeping magazine (collectively "the Novel"). *My Soul to Take* is a medical thriller about successful surgeon Suzannah Lord, a female Harrison Ford-type who is unwittingly foisted into fast-paced, life-threatening situations. The plot includes assassination attempts by rogue CIA elements, brain implants that give sight to the blind, and characters who can see the future. Dr. Polsby believes that the Novel is based on her life, and that Respondents therefore infringed her right of publicity.[1] Dr. Polsby's life bears no resemblance to the fictional landscape of the Novel. Even if it did, her claim still fails as a matter of law.

### A. *My Soul to Take*

*My Soul to Take* was first published in hardcover in March 1994, and in condensed form in the March 1994 issue of Good Housekeeping. The Novel comes from the imagination of Mr. Spruill, an author of fourteen works of fiction spanning a twenty-year career. For the Good Housekeeping version, Hearst retained Mr. Klavins, a Connecticut artist, to create accompanying sketches. Mr. Klavins hired two models through a Connecticut talent agency to aid his drawing.

The Novel opens with Dr. Lord, a lab assistant at the National Institutes of Health, immersed in a research study of the brain's code for vision. As part of her duties, Dr. Lord assists Dr. Roland Lancaster in surgically implanting microchips into the brains of blind volunteers, allowing them to see. One night at the lab, Dr. Lancaster makes a "pass" at Dr. Lord that she quickly rebuffs. Ultimately, Dr. Lord's rejection of Lancaster's advances leads to her dismissal from the project.

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[1] In her original lawsuit, Dr. Polsby also sought recovery for false light invasion of privacy, defamation, and intentional infliction of emotional distress. Her Petition indicates that she is no longer pursuing these claims, which were properly dismissed below.

Five years later, Dr. Lord, who has become a successful general surgeon, encounters Andrew Dugan, an implant recipient whose newfound vision allowed him to renew his career as an artist. Yet, Dugan begs Lord to remove the microchip because of a serious side effect that causes him to have "visions" of the future. This ability to see the future attracts the interest of a rogue section of the CIA, which, unbeknownst to Lord, seeks to harness this power to, among other things, anticipate the actions of foreign enemies.

The CIA operatives, who have begun implanting chips into the brains of agents, become concerned that Dr. Lord might interfere. At the Pentagon's athletic center, Dr. Lord barely escapes a CIA assassin. While waiting for Dugan at the National Zoo, she is ambushed and temporarily imprisoned in the polar bear den.

After Dugan is captured, Dr. Lord sneaks into CIA headquarters, but is overtaken by the CIA rogues who have foreseen her arrival. Dr. Lord narrowly escapes, and in the ensuing chase, drives off the George Washington Parkway. She flees across the ice-covered Potomac River. Eventually, she is caught, and readied for her own implant. As she is wheeled into the operating room, she hops off the gurney, grabs a bottle of ether, sets the room ablaze and escapes.

With time running out, Dr. Lord enlists the aid of the Secretary of Defense, narrowly averting a calamity. The CIA operation is exposed, and Dr. Lord returns to the comforting arms of her boyfriend, a reporter for the Washington Post.

**B. Dr. Polsby**

By contrast to Dr. Lord, Dr. Polsby is a disability claims examiner for the Social Security Administration. In 1983, with three months left in her residency, Dr. Polsby accepted a position with Dr. Thomas Chase, the Scientific

Director of NIH's National Institute of Neurological and Communicative Disorders and Strokes.

Dr. Polsby claims that at a conference in San Diego before her NIH position began, Dr. Chase lured her to his hotel room, made sexual advances, and invited her to join him in Mexico, which she says she declined. Thereafter, she began a two-year fellowship at NIH where she researched the connection between clinical depression and various neurological ailments. Dr. Polsby claims Dr. Chase retaliated against her for declining his advances by not renewing her position or affording her the necessary credit for completion of her residency. She claims to have been unable to secure another residency, rendering her ineligible for board certification.

In 1988, Dr. Polsby sued the Department of Health and Human Services for gender discrimination. Following a bench trial, United States District Judge Deborah K. Chasanow found for the government, concluding that:

> [Dr. Polsby's] account of her treatment by [Chase] at the conference in San Diego *simply is fabricated*....Not for a moment do I find [Dr. Polsby's] account credible....All in all I simply do not believe that [Chase] made an unwelcome and inappropriate "pass" at Dr. Polsby at that or any other time. Unfortunately, I believe that the incident was *concocted* in order to give spice to her later claims that [Chase] treated her differently than male fellows hired to do research [at NIH].

*Polsby v. Shalala*, Civ. No. DKC 88-2344, mem. op. at 7-8 (D. Md. Mar. 28, 1996) (emphases added).

### C. The Lawsuit

On March 18, 1996, Dr. Polsby sued Respondents in the Superior Court of the District of Columbia, claiming that the Novel infringed her right of publicity, cast her in a false light, defamed her, and intentionally inflicted emotional distress. Respondents timely removed the case to federal court. On August 8, 1996, Dr. Polsby's counsel withdrew from representation, leaving Dr. Polsby to proceed *pro se*.

On September 16, 1996, Mr. Klavins, a citizen of Connecticut with no ties to the District of Columbia, moved to dismiss for lack of personal jurisdiction. On February 12, 1997, United States District Judge Thomas F. Hogan dismissed him from the case. *Polsby v. Spruill*, No. 96-1641 (TFH), slip op. (D.D.C. Feb. 12, 1997) (Pet. App. at 22a.).

Also on September 16, 1996, Respondents moved to dismiss or for summary judgment, asserting that the Novel was not related to or based on Dr. Polsby's life story, and that regardless, Dr. Polsby could not recover as a matter of law. On August 1, 1997, the district court dismissed Dr. Polsby's claim. *Polsby v. Spruill*, No. Civ. 96-1641 (TFH), 1997 U.S. Dist. LEXIS 11621 (D.D.C. Aug. 1, 1997) (Pet. App. at 2a). The court also rejected Dr. Polsby's request for leave to amend her Complaint to add a copyright infringement claim, partly because Dr. Polsby had already filed an identical *pro se* copyright infringement lawsuit in the United States District Court for the Southern District of New York. A motion to dismiss that case is pending before the Honorable Michael B. Mukasey.[2] *See Polsby v. St. Martin's Press, Inc.*, No. 97 Civ. 0690 (MBM) (S.D.N.Y. filed Feb. 3, 1997).

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[2] On March 28, 1997, Dr. Polsby filed yet another *pro se* action in the United States District Court for the District of Columbia, this time against United States Senator Barbara A. Mikulski, Congressman Steny H. Hoyer, United States Attorney Lynne A. Battaglia, Maryland Court of

(continue)

### D. The Appeal

On August 29, 1997, Dr. Polsby noticed an appeal to the United States Court of Appeals for the D.C. Circuit, and filed a "Preliminary and Non-Binding Statement" of twenty-two "issues," including an unfounded accusation of bias against Judge Hogan. (*See* Pet. App. at 33a-34a.)

In accordance with Rule 27 of the Federal Rules of Appellate Procedure and Circuit Rule 27(g), Respondents moved for summary affirmance on December 1, 1997. On March 11, 1998, a unanimous three-judge panel of the D.C. Circuit summarily affirmed the district court's dismissal "substantially for the reasons stated in the district court's order" and based "[u]pon consideration of the [parties' filings]." (Pet. App. at 1a.) The court found that "[t]he merits of the parties' positions are so clear as to warrant summary action." (*Id.*)

On May 27, 1998, the three-judge panel denied Dr. Polsby's petition for rehearing, and the active judges of the D.C. Circuit unanimously declined Dr. Polsby's suggestion for rehearing *in banc*. (Pet. App. at 26a-27a.)

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(continued)
Appeals Judge Howard S. Chasanow (husband of U.S. District Judge Deborah K. Chasanow), Attorney General Janet Reno, and the United States of America. Dr. Polsby's eleven-count complaint alleges violations of the Racketeer-Influenced and Corrupt Organizations Act, the Civil Rights Act, and other federal statutes, based primarily upon an alleged conspiracy among the defendants to deprive Dr. Polsby of relief in her Title VII action before Judge Deborah Chasanow, and to cover up medical research fraud. A motion to dismiss is pending before United States District Judge Henry Kennedy. *See Polsby v. Mikulski*, No. 97-611 (D.D.C. filed Mar. 28, 1997).

## REASONS FOR DENYING THE WRIT

### THE DECISION BELOW INVOLVED THE STRAIGHTFORWARD APPLICATION OF SETTLED DISTRICT OF COLUMBIA LAW TO PETITIONER'S COMMON-LAW CLAIMS.

Dr. Polsby's instant Petition is nothing more than an invitation to revisit the careful and thorough decision of the district judge, who applied settled District of Columbia law in disposing of Dr. Polsby's meritless common-law claims. In focusing only on the district court's dismissal of her right of publicity claim and the D.C. Circuit's summary affirmance procedures, Dr. Polsby abandons her dismissed claims for false light invasion of privacy, defamation, and intentional infliction of emotional distress, and does not challenge the dismissal of Mr. Klavins for lack of personal jurisdiction. In attacking the summary affirmance, Dr. Polsby engages in a shameless, unsubstantiated attack on the integrity of the D.C. Circuit. (Pet. at 4-5.)

In essence, Dr. Polsby simply wants another bite at the apple. Her Petition fails to identify legitimate constitutional issues, departure from this Court's precedents, conflict with the decisions of the D.C. Court of Appeals, or conflict among the circuits. In accordance with Supreme Court Rule 10 and in light of the well-reasoned and correct decision of the district court below, the Court should deny the Petition.

### A. The District Court Properly Applied Controlling District of Columbia Law in Disposing of Polsby's Right of Publicity Claim.

To recover on her right of publicity claim,[3] Dr. Polsby has the heavy burden of proving that Respondents: (1) used her name or likeness in the Novel; (2) derived commercial benefit from her name or likeness, the public interest in her name or likeness, or any value associated with her name or likeness; (3) did so for the value connected with her name or likeness; (4) obtained a benefit from the use of her name or likeness; and (5) did not merely use her name or likeness incidentally or for a newsworthy purpose. *Lane*, 23 Media L. Rep. (BNA) at 1387; *Matthews v. Wozencraft*, 15 F.3d 432, 437 (5th Cir. 1994); RESTATEMENT (SECOND) OF TORTS § 652C (1977) ("RESTATEMENT").[4] As the district court held, Dr. Polsby fails to meet any of these requirements. (Pet. App. 9a-14a.)

The most glaring (and fatal) defects in Dr. Polsby's claim are her failure to offer any evidence that Respondents used her name or likeness, and did so for the commercial

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[3] In the District of Columbia, "right of publicity" and "misappropriation" are treated as a single cause of action. *Lane v. Random House, Inc.*, 23 Media L. Rep. (BNA) 1385, 1387 (D.D.C. 1995).

[4] Dr. Polsby's unsupported contention that the lower courts considered the "wrong" Restatement is belied by the D.C. Court of Appeals's holding in *Vassiliades v. Garfinckel's*, adopting the Restatement (Second) of Torts formulation. *See* 492 A.2d 580, 587, 592 (D.C. 1985). Regardless, § 46 of the Restatement (Third) of Unfair Competition, even if applicable, would not provide Dr. Polsby with a basis for recovery because § 46 applies only to "[o]ne who appropriates the commercial value of a person's identity ... *for purposes of trade,*" which *"does not ordinarily include the use of a person's identity in ... works of fiction ...."* RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 46, 47 (emphasis added).

value associated with her name or likeness. In the District of Columbia and elsewhere, the right of publicity involves "the use or benefit of *name* or *likeness*," not one's life story. RESTATEMENT § 652C; *see Vassiliades*, 492 A.2d at 592; *Matthews*, 15 F.3d at 437-38 (noting that "'likeness' does not include general incidents from a person's life, especially when fictionalized"); W. Page Keeton, *et al.*, *Prosser & Keeton on Torts* § 117 at 853 (5th ed. 1984) ("Nor is there any liability when ... the general outline of [plaintiff's] career, with many real incidents in [her] life, [is] used as the basis for a figure in a novel who is still clearly a fictional one."). Dr. Polsby failed to offer any evidence that Respondents used her name or likeness. (*See* Pet. App. at 10a.)[5]

Instead, Dr. Polsby contends that *My Soul to Take* is based on her life. Apart from the lack of similarity between the two, "It is simply not enough for a claim of misappropriation ... to show merely that a character in a novel is based on a real individual." (Pet. App. at 14a (citing *Matthews*, 15 F.3d at 437).)[6] Thus, even where an author *admits* basing a fictional character upon a real individual or using an individual's real name, or where third parties observe similarities between the individual and a character, right of publicity claims are routinely dismissed. *See, e.g.*, *Matthews*, 15 F.3d at 437; *Valentine v. CBS, Inc.*, 698 F.2d 430, 433 (11th Cir. 1983); *Hicks v. Casablanca Records*, 464 F. Supp. 426, 433 (S.D.N.Y. 1978) (finding "right of publicity does not attach ... where a fictionalized account of

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[5] Dr. Polsby's unsupported speculation that Mr. Klavins's sketches accompanying the Good Housekeeping version of the Novel "seem[] more likely taken from a photograph of her" (Pet. at 3) is insufficient in the face of uncontroverted evidence presented to the district court demonstrating that Mr. Klavins based his drawings on a model who, not surprisingly, looks identical to the sketches of Dr. Lord in the magazine.

[6] Dr. Polsby offers no authority for her contention that the right of publicity protects one's life story (Pet. at 24), a position contrary to settled law in the District of Columbia and elsewhere.

an event in the life of a public figure is depicted in a novel ... and ... it is evident to the public that the events so depicted are fictitious"); *see also Doe v. Roe*, 638 So. 2d 826, 829 (Ala. 1994) (rejecting claim "where a fictitious work, using the names or attributes of real people, is clearly presented as fiction").

Nevertheless, Judge Hogan compared the Novel with Dr. Polsby's life and found that despite some insignificant, coincidental similarities, "there are *many more differences*."[7] (Pet. App. at 11a (emphasis added).) The court also noted that Dr. Polsby failed to provide any evidence to contradict Mr. Spruill's sworn affidavit denying any knowledge of Dr. Polsby or her life story prior to this lawsuit. *(Id.)*

Regardless, even if Dr. Polsby could show that Respondents misappropriated her name or likeness, her claim would still fail because she cannot establish that there was commercial value associated with her name or likeness, and Respondents derived commercial benefit from the alleged

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[7] The many differences include: Polsby was a fellow in neurology studying connections between movement disorders and depression, while Lord was a lab assistant training to be a neurosurgeon and involved in microchip implants to give sight to the blind; Polsby's alleged sexual assault occurred before she arrived at NIH, while Lord's occurred in an NIH lab; Polsby completed her two-year fellowship, while Lord was fired from NIH after eight months; after leaving NIH, Polsby, with no help from Chase, could not qualify for her medical boards, could not practice medicine and became a claims examiner at the Social Security Administration, while Lord, with help from Lancaster, became a successful surgeon; Polsby sued NIH, Lord did not. Polsby also does not claim to have been chased by CIA agents who can see the future, or to have survived deadly encounters in the polar bear den at the National Zoo, at the CIA, on the streets of Langley, on the George Washington Parkway, on the Potomac River, or in the Pentagon's athletic club. Polsby also does not claim to have ever set a hospital room on fire, met the Secretary of Defense or dated a Washington Post reporter. Not surprisingly, Dr. Polsby's incorrect contention that the district court's opinion contains "numerous factual inaccuracies" (Pet. at 14) fails to identify even one of the alleged inaccuracies.

use. *Matthews*, 15 F.3d at 437; *Barnako v. Foto Kirsch, Ltd.*, No. 86-1700, 1987 WL 10230, at *2 (D.D.C. Apr. 16, 1987) (holding right of publicity requires that "commercial benefit was derived from the identity of the plaintiff and the value or reputation which the public associates with that identity"). The best she can do is suggest that Respondents derived commercial benefit simply from the sale of the Novel. (*See* Pet. at 24.) The mere fact that Respondents may have profited from the publication of the Novel is insufficient; Dr. Polsby cannot prove that Respondents used her name or likeness "*for the express purpose* of appropriating the commercial benefit" associated therewith. (Pet. App. at 9a (emphasis added)); *Vassiliades*, 492 A.2d at 592 ("Incidental use of name or likeness or publication *for a purpose other than taking advantage of a person's reputation or the value associated with his name* will not result in actionable appropriation.") (emphasis added); *Barnako*, 1987 WL 10230, at *2 (finding that "it is not enough to demonstrate that a defendant profited directly from the unauthorized use"); *Pearce v. E.F. Hutton Group*, 664 F. Supp. 1490, 1500 (D.D.C. 1987) (noting "[t]he essence of misappropriation" is that the defendant used the name or likeness "to take advantage of some value associated with it"); *Lane*, 23 Media L. Rep. (BNA) at 1388; *Valentine*, 698 F.2d at 433 ("Use of a name is not harmful simply because it is included in a publication sold for profit."); RESTATEMENT § 652C cmts. a, b & d (noting that "[t]he fact that the defendant is engaged in the business of publication ... out of which he seeks to make a profit, is not enough").[8]

District of Columbia courts have uniformly disposed of right of publicity claims premised on Dr. Polsby's flawed

[8] Dr. Polsby ignores the very text of the district court's opinion when she incorrectly claims that the court provided no authority for this well-settled prerequisite to recovery. (*Compare* Pet. at 16, 24 *with* Pet. App. at 9a.) She also fails to offer any legal authority to the contrary.

theory. *See Vassiliades*, 492 A.2d at 592 (rejecting claim relating to admitted commercial use of photographs where no "public interest or other value in [plaintiff's] likeness"); *Barnako*, 1997 WL 10230, at *2 (rejecting claim regarding use of likeness in promotional materials where no evidence that defendant "derived any commercial benefit from a misperceived association"); *Pearce*, 664 F. Supp. at 1500 (rejecting claim where "no evidence that plaintiff's name was of any particular value or that it was included ... to take advantage of plaintiff's reputation or the value associated with his name"); *see also Matthews*, 15 F.3d at 437-38 (rejecting claim that defendant's novel was based on his life story because the defendant was "not 'cashing-in' on goodwill associated with his name but is simply converting factual events that happen to include [plaintiff] into fiction").[9]

Accordingly, the lower courts properly dismissed Dr. Polsby's right of publicity claim.

### B. The Court of Appeals Gave Petitioner Sufficient Appellate Review.

The remainder of Dr. Polsby's Petition attacks the adequacy of appellate review by the D.C. Circuit, which affirmed the district court's dismissal. Dr. Polsby contends that the D.C. Circuit's rejection of her arguments denied her the "fundamental right" to an appeal. (Pet. at 25.)

It is well-settled, however, that "there is no constitutional right to an appeal." *Abney v. United States*, 431 U.S. 651, 656 (1977). Dr. Polsby's appeal to the D.C.

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[9] Dr. Polsby's citation of *Carson v. Here's Johnny Portable Toilets, Inc.*, while not controlling in the District of Columbia, is not to the contrary. In *Carson*, the court recognized the "pecuniary value" associated with the phrase "Here's Johnny," and the defendant admitted that had it not been for the phrase's association with well-known entertainer Johnny Carson, defendant would not have used it. *See* 698 F.2d 831, 836-37 (6th Cir. 1983).

Circuit was pursuant 28 U.S.C. § 1291, which allows for appeals from final decisions of a district court. Federal law permits the adjudication of such appeals by panels of three circuit judges. 28 U.S.C. § 46.[10] Thus, on March 11, 1998, a unanimous three-judge panel of the D.C. Circuit summarily affirmed the district court's dismissal of Dr. Polsby's case, "substantially for the reasons stated in the district court's order ...." (Pet. App. at 1a.) The panel's March 11 order explicitly states that the judges, "[u]pon *consideration* of the" parties' filings, held that "[t]he merits of the parties' positions are so clear as to warrant summary action." (Pet. App. at 1a (emphasis added).)

Nevertheless, Dr. Polsby challenges the D.C. Circuit's use of summary procedures in affirming the district court's dismissal. The panel's summary affirmance, however, was in keeping with procedures sanctioned by this Court and established by the D.C. Circuit in accordance with 28 U.S.C. § 2071.

This Court has long-permitted federal courts of appeals to dispose of cases by summary affirmance. *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972) (noting that "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions ... especially ... with respect to summary affirmances"); *Lego v. Twomey*, 404 U.S. 477, 482 n.6 (1972) (reviewing court of appeals's summary affirmance without comment on its summary nature). Indeed, at least four current Justices of this Court have granted motions for summary affirmance at the circuit court level. *See, e.g., Tucker v. Thornburgh*, 927 F.2d 1258 (D.C. Cir. 1991) (Ginsburg and Thomas, JJ.); *Metro*

[10] Dr. Polsby cites *In re Woods*, 143 U.S. 202, 205-06 (1892), for the role of the courts of appeals in "relieving this court of the oppressive burden of general litigation." Ironically, in *Woods*, this Court denied *certiorari* because, as here, the petition sought merely to have this Court determine whether state law had been properly applied below. *Id.*

*Chevrolet, Inc. v. Union de Tronquistas,* 835 F.2d 3 (1st Cir. 1987) (Breyer, J.); *Morgan v. United States,* 801 F.2d 445 (D.C. Cir. 1986) (Scalia, J.), *cert. denied,* 480 U.S. 911 (1987).

As recognized by this Court, summary procedures have become imperative in managing the courts of appeals' ever-expanding dockets. *Taylor,* 407 U.S. at 195-96 (noting that "courts of appeals ... need the maximum possible latitude to deal with the 'flood tide' of appeals that the 'ever growing explosive increase' of federal judicial business has produced") (Rehnquist, J. dissenting). The D.C. Circuit has recognized that summary disposition can provide "a major savings of time, effort, and resources for the parties, counsel, and the Court." *Handbook of Practice and Internal Procedures: United States Court of Appeals for the District of Columbia Circuit* 50 (1997) ("*Handbook*"). Indeed, even Dr. Polsby concedes that summary affirmance is "appropriate" for "certain types of cases." (Pet. at 5.)

In accordance with Rule 27(c) of the Federal Rules of Appellate Procedure, D.C. Circuit Rule 27(g) expressly provides for the filing of dispositive motions within forty-five days of the docketing of an appeal as Respondents did here. Moreover, the D.C. Circuit's *Handbook of Practice and Internal Procedures* states that "[p]arties are particularly *encouraged* to file dispositive motions where a sound basis exists for summary disposition." *Handbook* 50 (emphasis added). The D.C. Circuit has held that summary affirmance is appropriate where the merits of the parties' positions are so clear that "no benefit will be gained from further briefing and argument." *Taxpayers Watchdog, Inc. v. Stanley,* 819 F.2d 294, 297-98 (D.C. Cir. 1987); *Walker v. Washington,* 627 F.2d 541, 545 (D.C. Cir.), *cert. denied,* 449 U.S. 994 (1980); *Handbook* 66.

The D.C. Circuit's disposal of cases by summary affirmance is hardly new, is appropriate in appeals by *pro se*

appellants, *see, e.g., Martin-Trigona v. Smith,* 712 F.2d 1421 (D.C. 1983), *Walker,* 627 F.2d 541, and is in keeping with similar procedures in other circuits, a number of which have explicit rules permitting motions for summary affirmance. *See, e.g., Williams v. Jeeps Sales & Serv. Co.,* No. 97-2751, 1998 WL 614438, at *2 (4th Cir. Sept. 10, 1998); *Cowhig v. United States,* No. 98-5116, 1998 WL 568678 (Fed. Cir. Aug. 20, 1998); *Metro Chevrolet, Inc.,* 835 F.2d at 4; *United States v. Baynes,* 548 F.2d 481 (3d Cir. 1977); 1st Cir. R. 27.1; 2d Cir. R. 27; 3d Cir. R. 27.4; 4th Cir. R. 27(g); 8th Cir. R. 47A; 9th Cir. R. 3-6. In addition, Dr. Polsby acknowledges that "[a]ll the circuits allow for summary affirmance." (Pet. at 19.)

Nevertheless, she claims that the D.C. Circuit's use of summary procedures violated her rights to due process and equal protection, both in their operation generally and their application to her appeal in particular. The only "authority" Dr. Polsby can muster is D.C. Circuit Judge Abner Mikva's 1984 dissenting opinion in *United States v. Glover,* criticizing the court's procedures *at the time* for handling motions for summary affirmance, *"especially in criminal cases."* 731 F.2d 41, 48 (D.C. Cir. 1984) (emphasis added) (Mikva, J. dissenting). In doing so, Judge Mikva, however, conceded that "no party has a constitutional right to appellate process in this court." *Id.* at 51. In addition, over the intervening fourteen years, the D.C. Circuit has addressed his concerns and modified its internal operating procedures, including now requiring that dispositive motions be considered and decided by three-judge panels, as occurred here. *Handbook* 56-57. Indeed, since *Glover,* Judge Mikva has granted innumerable motions for summary affirmance, apparently in recognition of the changes in the internal procedures in which Judge Mikva no doubt participated given his service as chief judge of the D.C. Circuit during the fourteen-year period. *See, e.g., Alexander v. Runyon,* No. 92-5453, 1993 WL 190958 (D.C. Cir. May 25, 1993) (Mikva,

C.J., and Wald & Ruth Bader Ginsburg, JJ.); *Sindram v. United States,* Nos. 92-5374 & 92-5465, 1993 WL 191794 (D.C. Cir. May 25, 1993) (same); *Covington & Burling v. Food & Nutrition Service,* No. 92-5398, 1993 WL 185239 (D.C. Cir. May 20, 1993) (same); *Tucker,* 927 F.2d 1258 (D.C. Cir. 1991) (Mikva, C.J., and Ruth Bader Ginsburg & Thomas, JJ.).

Dr. Polsby has failed to offer any legal support for her challenge to the D.C. Circuit's well-established summary procedures or any legitimate basis for assuming that the court deviated from its established guidelines in adjudicating her appeal. Instead, she relies on rank speculation that the three active D.C. Circuit judges, all in good standing, must have ignored her arguments, contrary to the explicit statement in the March 11 order that they *considered* all of the parties' submissions, which included Dr. Polsby's laundry list of twenty-two "issues" for appeal. *See Furman v. United States,* 720 F.2d 263, 264-65 (2d Cir. 1983) ("The fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal."); *United States v. Pajooh,* 143 F.3d 203, 204 (5th Cir. 1998) (rejecting argument that summary affirmance deprived appellant of meaningful review).

In her latest conspiracy theory, Dr. Polsby boldly assumes that the court's staff must have subverted the appellate process in this case in a rant that is not only devoid of anything resembling evidence, but also an insult and affront to the judges and staff of that court, of which three current Justices of this Court used to be members.[11] In addition, it is belied by the refusal of not only the panel but

[11] Moreover, Dr. Polsby's conspiracy theory proves too much since she cannot show that the clerks and staff of the D.C. Circuit are not involved in appeals not handled summarily.

also every active D.C. Circuit judge to rehear her appeal in the face of these outrageous accusations. (Pet. App. at 26a, 27a.)

In recognition of the defects of her position, Dr. Polsby finally argues that even though summary affirmance may be appropriate "in certain types of cases" (Pet. at 5), it was not appropriate here because her right of publicity claim is a "complex" claim "of first impression" in the D.C. Circuit involving a "newly-recognized" tort. (Pet. at 19-20.) Even if Dr. Polsby were correct about the propriety of granting summary affirmance in such cases, hers was no such case.

As demonstrated in Respondents' reply brief to the D.C. Circuit, hers is *not* a case of first impression for the D.C. Circuit or the district court. *See Brown v. Twentieth Century-Fox Film Corp.*, 15 F.3d 1159 (D.C. Cir. 1994) (affirming dismissal of right of publicity claim); *Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356, 360-61 (D.C. Cir. 1983); *Lane*, 23 Media L. Rep. (BNA) at 1387; *Pearce*, 664 F. Supp. 1490; *Barnako*, 1987 WL 10230, at *2. Likewise, it is not a case of first impression for the Court of Appeals of the District of Columbia, which addressed and disposed of a similar right of publicity claim in *Vassiliades*, 492 A.2d 580. *See generally Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

Given the patent deficiencies in Dr. Polsby's right of publicity claim, it could hardly be classified as anything other than simple. Finally, even Dr. Polsby acknowledges that the right of publicity, which dates back at least to the 19th Century, *see* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 215 (1890), was considered forty-five years ago, *see Haelen Labs., Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir.), *cert. denied*, 346 U.S. 816 (1953), and thus can hardly be characterized as "newly recognized."

Accordingly, Dr. Polsby has failed to demonstrate that the D.C. Circuit's summary affirmance of the district court's dismissal was anything but proper.

## CONCLUSION

For these reasons, the Court should deny the Petition.

Respectfully submitted,

BRUCE W. SANFORD
*Counsel of Record*
ROBERT D. LYSTAD
DAVID S. WACHEN
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1500

*Counsel for Respondents*